

EXHIBIT 48

Picard v. Merkin

Morris Smith 3-4-14

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,
Debtor.

Adv.Pro.No.
08-01789 (BRL)

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IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,
Plaintiff,

Adv.Pro.No.
09-1182 (BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.

-----x

VIDEOTAPED DEPOSITION of MORRIS SMITH, as
reported by NANCY MAHONEY, Certified Court Reporter,
RPR, CLR and Notary Public of the States of New York
and New Jersey, at the offices of BAKER HOSTETLER,
45 Rockefeller Plaza, New York, New York on Tuesday,
March 4, 2014, commencing at 10:14 a.m.

10:16:42 1 A. In 1979.

10:16:43 2 Q. What degree did you -- were you
10:16:45 3 awarded?

10:16:45 4 A. I think it was a BA or BS, I don't
10:16:48 5 recall, in accounting and in economics.

10:16:49 6 Q. And did you go to graduate school
10:16:52 7 afterwards?

10:16:53 8 A. Yes, I went to the Wharton School of
10:16:55 9 Business, University of Pennsylvania, where I
10:16:58 10 graduated in May 1982.

10:16:59 11 Q. And what degree were you awarded from
10:17:02 12 Wharton?

10:17:02 13 A. An MBA in finance.

10:17:04 14 Q. Did you have -- did you attend any
10:17:06 15 other graduate classes?

10:17:08 16 A. No.

10:17:09 17 Q. Do you have any professional licenses
10:17:11 18 or certificates?

10:17:11 19 A. I had a Certified Public Accountancy
10:17:15 20 license, but it's been inactive for many years.

10:17:18 21 Q. After you graduated from Wharton,
10:17:21 22 where did you begin employment?

10:17:23 23 A. At Fidelity Investments in Boston.

10:17:25 24 Q. And approximately when was that?

10:17:27 25 A. 1982.

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10:17:28 1 Q. And if you could walk us through your
10:17:30 2 time at Fidelity, what positions did you hold at
10:17:32 3 Fidelity?

10:17:33 4 A. Sure. I held positions as a security
10:17:35 5 analyst and then as a portfolio manager; first two
10:17:39 6 years were primarily analyst, the last eight years
10:17:42 7 were primarily portfolio management.

10:17:44 8 Q. What were your duties and
10:17:46 9 responsibilities as an analyst at Fidelity?

10:17:48 10 A. The way Fidelity was structured, we
10:17:51 11 covered industries and the primary responsibility
10:17:54 12 was to analyze companies and have recommendation of
10:17:58 13 stocks that we think that we should purchase or
10:18:02 14 sell, if we own them, to the various fund managers
10:18:05 15 in the different groups.

10:18:06 16 Q. And approximately how long did you
10:18:08 17 hold that position?

10:18:09 18 A. Approximately two years.

10:18:10 19 Q. And did there come a time that you
10:18:12 20 were asked to take over Fidelity's Leisure Select
10:18:17 21 Fund?

10:18:17 22 A. Right, I was asked to take that over
10:18:19 23 -- actually the fund started in 1984, and I was told
10:18:22 24 to start to manage that in 1984.

10:18:25 25 Q. And what did that fund invest in?

10:18:27 1 A. Primarily leisure and entertainment
10:18:32 2 securities.

10:18:33 3 Q. And, if you know, approximately how
10:18:35 4 much money was under management in that fund?

10:18:37 5 A. When I started, it had about half a
10:18:39 6 million dollars that was seeded internally; when I
10:18:43 7 finished, it was about \$350 million in 1986.

10:18:46 8 Q. After you finished in 1986, did there
10:18:49 9 come a time that you took over the over-the-counter
10:18:51 10 fund at Fidelity?

10:18:53 11 A. That is correct.

10:18:53 12 Q. And what type of fund is that?

10:18:54 13 A. Invested primarily in
10:18:56 14 over-the-counter securities.

10:18:57 15 Q. And, again, how much money
10:18:59 16 approximately was under management?

10:19:00 17 A. Roughly a billion dollars.

10:19:02 18 Q. And how long did you manage that
10:19:05 19 fund?

10:19:05 20 A. For four years.

10:19:06 21 Q. Now, after four years, what fund did
10:19:10 22 you take over next?

10:19:11 23 A. Took over the Fidelity Magellan Fund.

10:19:14 24 Q. What is the Fidelity Magellan Fund?

10:19:17 25 A. At that time it was the largest

equity fund, I guess in the world, and the fund, I think, at that time consisted of \$13 billion of assets.

Q. Who did you take it over from?

A. Peter Lynch.

Q. And you said it was \$13 billion when you started. How long did you manage that fund?

A. Two years.

Q. And what was the value of the fund when -- after two years?

A. The size of it was \$21 billion.

Q. Did there come a time that you left Fidelity?

A. In 1992.

Q. And what, if anything, did you do after you left Fidelity?

A. I went with my family for seven years, we lived in Israel from 1992 to 1999.

Q. Did you return to the United States in 1999?

A. That is correct.

Q. And what, if any, other positions have you held since your return to the United States in 1999?

A. I've done work as a consultancy for

10:22:47 1 developed a personal relationship with Mr. Merkin?

10:22:49 2 A. I think that evolved over that time
10:22:53 3 period. As you get to meet the person, maybe
10:22:54 4 formally, informally, you develop somewhat of a
10:22:57 5 social relationship also.

10:22:59 6 Q. And, again, what period of time are
10:23:00 7 we talking about?

10:23:02 8 A. Late '80s, early '90s, not specific.

10:23:06 9 Q. Did there come a time that you
10:23:07 10 developed a business relationship with Mr. Merkin?

10:23:11 11 A. I guess if you're going to describe
10:23:13 12 that as a investment in his funds, is that your
10:23:16 13 description? I need clarification of that.

10:23:18 14 Q. Did you ever deal with him in a
10:23:20 15 professional capacity?

10:23:21 16 A. As far as money management, no, not
10:23:25 17 that I recall.

10:23:26 18 Q. So let me ask you about -- you
10:23:29 19 brought up investment. Did there come a time that
10:23:31 20 you decided to invest with Mr. Merkin?

10:23:33 21 A. Yes.

10:23:33 22 Q. Approximately when was that?

10:23:34 23 A. Approximately 1992.

10:23:36 24 Q. And how did you choose to invest with
10:23:38 25 Mr. Merkin?

10:23:39 1 A. I think from speaking to him about
10:23:41 2 the investment product -- I don't have specific
10:23:43 3 recall of the conversation, but I believe it was in
10:23:47 4 1992 relating to investing in hedge funds, as I
10:23:50 5 start to -- I think in that time period is when I
10:23:53 6 started to look at investing in hedge funds.

10:23:55 7 Q. All right. So in 1992, did
10:23:58 8 Mr. Merkin describe to you any particular hedge fund
10:24:00 9 products?

10:24:00 10 A. Yeah, I believe the one that I
10:24:02 11 invested in was Ascot Partners.

10:24:05 12 Q. And did you have a conversation with
10:24:07 13 Mr. Merkin about Ascot?

10:24:09 14 A. I'm sure I did. I don't have
10:24:11 15 specific recall. I recall the general parameters,
10:24:14 16 but I don't recall specifically exactly where, what
10:24:17 17 date, et cetera.

10:24:18 18 Q. So, generally, to the best of your
10:24:20 19 recollection, what did you talk about in 1992 with
10:24:22 20 regard to Ascot Fund?

10:24:24 21 MR. STEINER: Objection to form.

10:24:25 22 A. The -- the discussion related to
10:24:29 23 exactly what the product was, and Ezra described it
10:24:34 24 that it was an option-based trading strategy, a
10:24:37 25 strategy that would never knock the socks off -- you

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10:24:41 1 know, sort of never have outlandish returns but very
10:24:45 2 strong steady returns over time. And he described
10:24:47 3 the basic strategy -- I'm not much of an options
10:24:50 4 person, but he described the basic strategies where,
10:24:54 5 you know, when he would want to -- he would be
10:24:57 6 bullish on stocks, you know, you would buy stocks
10:24:59 7 and you can write a call and buy a put to protect
10:25:02 8 your downside and you're -- when you're negative in
10:25:04 9 the market, you can do the opposite of that and you
10:25:06 10 can also be in cash. So that was his basic
10:25:08 11 strategy. And it sounded like a good alternative
10:25:11 12 use of cash. So that was probably the first time I
10:25:13 13 invested in it.

10:25:15 14 Q. And during the -- I'm asking you
10:25:19 15 prior -- during these initial conversations that
10:25:22 16 you're describing now, did there come a time that
10:25:24 17 Mr. Merkin indicated to you who would actually be
10:25:27 18 executing the strategies of Ascot?

10:25:30 19 MR. STEINER: Objection to form.

10:25:31 20 A. As far as I remember for that
10:25:33 21 conversation, I believe it was Ezra Merkin.

10:25:37 22 Q. At any time prior to your investing
10:25:39 23 with Ascot, did he indicate that Ascot Partners
10:25:42 24 would use third-party managers to implement their
10:25:44 25 strategy?

10:25:45 1 A. No.

10:25:50 2 Q. And did you ultimately choose to
10:25:52 3 invest in Ascot Partners?

10:25:53 4 A. I did.

10:25:54 5 Q. Now, I want to ask you: When you
10:26:00 6 invested, did you invest -- did you open an account
10:26:03 7 in your own name or did you open an account -- what
10:26:06 8 account did you open up?

10:26:07 9 A. I believe initially it was my own --
10:26:08 10 myself and my wife.

10:26:11 11 Q. Are you familiar with an entity
10:26:13 12 called the Brook Road Trust?

10:26:15 13 A. Right, that may have been the entity
10:26:16 14 that was utilized -- I don't recall -- but that was
10:26:19 15 set up for me when I was living in Israel, which --
10:26:22 16 again, I don't know the date of the first investment
10:26:25 17 in Ascot, but this is definitely related to my
10:26:28 18 timing of leaving Fidelity, we moved to Israel, and
10:26:33 19 the setting up of Brook Road Nominee Trust was done
10:26:36 20 for tax purposes within Israel.

10:26:38 21 Q. So is Brook Road Trust an entity that
10:26:42 22 you manage or control?

10:26:43 23 A. I think my mother may be the formal
10:26:45 24 trustee, but in a sense that would be correct.

10:26:48 25 Q. How about the SJM Pension, are you

10:26:50 1 familiar with that entity?

10:26:51 2 A. Right, that was set up probably
10:26:54 3 somewhere in the 2000s.

10:26:56 4 Q. Is that also an entity that you
10:26:58 5 manage or control?

10:26:59 6 A. Yes, I'm the president.

10:27:01 7 Q. How about an entity called the Smith
10:27:04 8 Exemption Trust, are you familiar with that entity?

10:27:07 9 A. Yes.

10:27:08 10 Q. Is that also an entity that you have
10:27:10 11 -- that you manage or control?

10:27:12 12 A. My wife is the trustee.

10:27:15 13 Q. Okay. And your wife's name is?

10:27:18 14 A. Devora, D-e-v-o-r-a.

10:27:20 15 Q. Devora Smith?

10:27:22 16 A. Yes.

10:27:29 17 Q. Did you -- did there ever come a time
10:27:32 18 that you invested in any other investment products
10:27:34 19 through Mr. Merkin?

10:27:35 20 A. Yes, I invested in Gabriel Capital.
10:27:38 21 I do not know the date that that investment was
10:27:44 22 made. And then I also invested in a number of
10:27:51 23 Cerberus products which he was associated with,
10:27:55 24 depending on the product itself. I was an investor
10:27:57 25 in Abelco, which is a company that I believe he's

10:28:01 1 one of the general partners with Steve Feinberg, if
10:28:04 2 I'm not mistaken.

10:28:05 3 Q. Who is Steve Feinberg?

10:28:07 4 A. He's the -- I believe the managing
10:28:09 5 partner of Cerberus.

10:28:13 6 Q. Prior to investing in Gabriel
10:28:16 7 funds -- Gabriel Capital, did you have a
10:28:18 8 conversation with Mr. Merkin concerning the strategy
10:28:22 9 employed in that product?

10:28:23 10 A. I'm sure I did.

10:28:25 11 Q. And what, if anything, did he tell
10:28:27 12 you about Gabriel?

10:28:28 13 A. I think what was -- the investment
10:28:31 14 purpose was to invest in distressed securities, out
10:28:35 15 of favor securities, high income type of bond sort
10:28:40 16 of investments, different products like -- different
10:28:44 17 investment areas like that.

10:28:47 18 Q. Did Mr. Merkin indicate who would be
10:28:51 19 implementing Gabriel's strategy?

10:28:52 20 MR. STEINER: Objection to form.

10:28:53 21 A. Yeah, he would be the fund manager.

10:28:57 22 Q. During your conversation with
10:28:59 23 Mr. Merkin prior to investing, did Mr. Merkin
10:29:03 24 indicate that he would ever use third-party managers
10:29:05 25 to implement Gabriel's strategy?

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10:29:07 1

A. No.

10:29:08 2

MR. STEINER: Objection to form.

10:29:09 3

A. No.

10:29:11 4

Q. Let me ask you: Are you familiar

10:29:13 5

with an individual by the name of Victor Teicher?

10:29:16 6

A. Yes.

10:29:18 7

Q. Did Mr. Merkin ever mention that name

10:29:20 8

to you?

10:29:21 9

A. Yes.

10:29:21 10

Q. What, if anything, did he tell you

10:29:23 11

about Mr. Teicher?

10:29:25 12

A. Nothing specific that I recall.

10:29:28 13

Q. Did he ever indicate to you that

10:29:31 14

Mr. Teicher managed money on behalf of Gabriel?

10:29:33 15

MR. STEINER: Objection to form.

10:29:34 16

A. Not that I recall.

10:29:35 17

Q. You mentioned Stephen Feinberg

10:29:37 18

before. Did Mr. Merkin ever mention Stephen

10:29:40 19

Feinberg to you?

10:29:42 20

A. Yes.

10:29:44 21

Q. What did he say about Mr. Feinberg?

10:29:46 22

A. Well, I knew he was his partner in

10:29:49 23

Abelco.

10:29:50 24

Q. Did he ever indicate to you that he

10:29:52 25

managed money on behalf of Gabriel?

10:36:10 1 A. Yes, it is.

10:36:11 2 Q. And what types of information would
10:36:13 3 these letters contain?

10:36:15 4 A. I guess the information we see here,
10:36:18 5 basically how your investment did during the month
10:36:20 6 -- the quarter, I should say, and this appears to be
10:36:23 7 representative.

10:36:27 8 Q. Do these letters contain information
10:36:29 9 regarding the performance of the fund?

10:36:31 10 A. Yes.

10:36:31 11 Q. Do these letters contain any
10:36:34 12 information regarding the strategy employed by the
10:36:36 13 fund?

10:36:36 14 A. Not that I can see.

10:36:38 15 Q. Do they have what you -- do they have
10:36:41 16 any of the information that you described as
10:36:43 17 Mr. Merkin's musings?

10:36:45 18 A. No.

10:36:53 19 Q. Let me ask you: After your initial
10:36:55 20 investment in Ascot Fund, did you ever have an
10:36:59 21 opportunity to speak to Mr. Merkin further about the
10:37:03 22 fund's strategy?

10:37:04 23 A. Yes.

10:37:05 24 Q. When did you speak to him?

10:37:08 25 A. A number of times over the 15 -- 15,

10:37:13 1 16-year period, I'd say.

10:37:14 2 Q. Do you recall approximately how many
10:37:16 3 times you spoke to him?

10:37:17 4 A. I'm going to guess. Maybe two or
10:37:19 5 three times. I don't have specific recall to that.

10:37:23 6 Q. What, if anything, did -- let me try
10:37:26 7 to break the conversations up.

10:37:27 8 Do you recall, were you still in
10:37:31 9 Israel when you spoke to him initially after your
10:37:33 10 investment or had you come back to the United
10:37:36 11 States?

10:37:36 12 A. I used to travel back and forth. So
10:37:38 13 I don't -- my guess is, if I had a discussion about
10:37:41 14 exactly what Ascot is doing, it would have been
10:37:44 15 here, not on the phone.

10:37:45 16 Q. And you testified you returned from
10:37:46 17 Israel in 1999?

10:37:48 18 A. Correct.

10:37:49 19 Q. What did -- what, if anything, did
10:37:50 20 Mr. Merkin tell you about the strategy employed by
10:37:54 21 Ascot Fund?

10:37:54 22 A. There were no material changes as far
10:37:57 23 as the strategy goes. I don't remember -- I don't
10:38:00 24 recall him ever deviating from the strategy. He
10:38:06 25 mentioned a number -- a couple of times about

10:38:08 1 capacity constraints, but I don't remember any
10:38:11 2 changes about strategy.

10:38:13 3 Q. Let me ask you about this capacity
10:38:16 4 constraints. What -- what did he say about these
10:38:22 5 capacity constraints?

10:38:23 6 A. There were -- I remember him
10:38:25 7 mentioning at least once, maybe twice, that there
10:38:28 8 were -- he felt like there were times they were
10:38:30 9 bumping up against the limits of being able to do
10:38:32 10 the trades profitably.

10:38:33 11 Q. What did you understand that to mean?

10:38:35 12 A. The thinness of the market as far as
10:38:39 13 being able to execute the option trades related to
10:38:42 14 owning -- owning or shorting the stocks underneath.

10:38:47 15 Q. Did he ever give you any indication
10:38:49 16 of what he thought the limit of Ascot's trading
10:38:51 17 strategy in the options market were?

10:38:53 18 A. I believe I heard once the number of
10:38:55 19 about a billion dollars.

10:38:58 20 Q. During any of your conversation --
10:39:01 21 subsequent conversations with Mr. Merkin, did he
10:39:03 22 discuss how he determined when to be in or out of
10:39:07 23 the market?

10:39:07 24 MR. STEINER: Objection to form.

10:39:09 25 A. It seemed to be based on his feel in

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10:39:11 1 the market. He would occasionally ask me how I feel
10:39:14 2 about the market, since I was obviously involved, so
10:39:17 3 we would have discussions about the stock market.
10:39:20 4 That, I guess, you know, just his discussions with
10:39:22 5 other investors, et cetera and how he felt about the
10:39:25 6 environment.

10:39:25 7 Q. Did he ever discuss with you how he
10:39:28 8 got -- whether he got any reports or trading runs
10:39:32 9 from any individuals that would give him insight
10:39:34 10 into the market?

10:39:34 11 A. Yeah, he had -- I remember a person
10:39:38 12 named Ken, who I thought had worked, I think, at
10:39:43 13 Oppenheimer, because he was once -- Ezra was once
10:39:46 14 discussing the runs, the computer runs, that he was
10:39:48 15 looking to evaluate some of the trades.

10:39:50 16 Q. And what would Ken -- what, if
10:39:51 17 anything, would Ken provide to Mr. Merkin?

10:39:52 18 A. I have no idea. I just remember a
10:39:54 19 conversation -- I do remember that part of a
10:39:57 20 conversation.

10:39:58 21 Q. Did Mr. Merkin indicate what he would
10:40:00 22 do with these runs from Oppenheimer Fund?

10:40:02 23 A. Not specifically, but I'm assuming he
10:40:05 24 was using those for investment criteria.

10:40:09 25 Q. During any subsequent conversation

10:40:11 1 with Mr. Merkin, did he ever discuss who the
10:40:14 2 custodian of Ascot Fund was?

10:40:15 3 A. Yeah, the custodian he had told me
10:40:19 4 was -- for all of his assets was Morgan Stanley.

10:40:23 5 Q. And during any of these conversations
10:40:26 6 did he indicate who, in fact, was executing the
10:40:29 7 strategies --

10:40:30 8 MR. STEINER: Objection to form.

10:40:30 9 Q. -- for Ascot Fund?

10:40:31 10 A. So I'm not sure when this was, but
10:40:34 11 the name Bernie Madoff or Madoff security -- I don't
10:40:38 12 recall specifically -- came up somewhere along the
10:40:41 13 way that they were, in a sense, the executing broker
10:40:43 14 of the strategies. You know, that -- I think back
10:40:49 15 to -- that's why -- I remember the discussion about
10:40:52 16 the computer runs. That was, I'm guessing, the late
10:40:56 17 '90s, early 2000s, that's what I recalled about
10:40:59 18 that, but he had mentioned that somewhere along the
10:41:01 19 way.

10:41:01 20 Q. Let me ask you: Prior to
10:41:03 21 December 2008, were you familiar with Mr. Bernard
10:41:05 22 Madoff?

10:41:06 23 A. I never met him.

10:41:06 24 Q. Did you have an understanding of who
10:41:09 25 he was?

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10:41:09 1 A. No -- actually, I was aware that he
10:41:14 2 was on the board of trustees, possibly -- he was
10:41:18 3 involved with Yeshiva University on some sort of --
10:41:21 4 some sort of trustee board level, because it had
10:41:25 5 come up in one of our investment committee meetings.

10:41:29 6 Q. How about Bernard L. Madoff
10:41:33 7 Investment Securities, were you familiar with that
10:41:35 8 entity prior to December 2008?

10:41:36 9 A. No.

10:41:39 10 Q. And you said that at some point
10:41:44 11 during your conversations with Mr. Merkin he
10:41:46 12 indicated to you that Mr. Merkin was the executing
10:41:48 13 broker for Ascot?

10:41:49 14 A. Yes.

10:41:52 15 Q. Did he give you any more information
10:41:56 16 about the relationship between Mr. Madoff and Ascot
10:41:59 17 Fund?

10:41:59 18 A. Not that I recall.

10:42:03 19 Q. What was your understanding of the
10:42:05 20 role of an executing broker?

10:42:08 21 A. Basically that he would put up the
10:42:10 22 trades, he would -- and in a sense he would --
10:42:12 23 whatever looked attractive for him, he would
10:42:15 24 implement as trades and Ezra would have told him to
10:42:19 25 be in the market or not to be in the market, and

10:42:21 1 based upon the attractiveness of the trades and
10:42:24 2 Ezra's guidance, he would go ahead and do those.

10:42:26 3 Q. Now, does the executing broker have
10:42:29 4 discretion to make trades?

10:42:34 5 MR. STEINER: Objection to form.

10:42:34 6 Q. Let me rephrase that.

10:42:36 7 Based on your understanding of the
10:42:39 8 relationship between Mr. Madoff and Ascot Fund, what
10:42:45 9 was your understanding of who was actually
10:42:48 10 determining which investments to make?

10:42:50 11 MR. STEINER: Objection to form.

10:42:50 12 A. My impression was that Ezra was
10:42:55 13 making the decisions to be in and out of the market
10:42:58 14 and Madoff was setting up the trades for him.

10:43:02 15 Q. And where did you get this
10:43:04 16 understanding from?

10:43:04 17 A. From our conversations.

10:43:06 18 Q. The conversations between you and
10:43:07 19 Mr. Merkin?

10:43:08 20 A. Right.

10:43:11 21 Q. I want to show you -- mark this
10:43:15 22 Trustee's Exhibit 237.

10:43:16 23 (Deposition Trustee Exhibit 237
24 marked for identification.)

10:43:39 25 BY MR. ALLEN:

10:44:35 1 be rolled over or sent over to Ezra to understand
10:44:37 2 what the actual net profits were in the fund for the
10:44:43 3 month.

10:44:43 4 Q. And what was your understanding of
10:44:44 5 the role between Mr. Madoff and Ascot?

10:44:46 6 MR. STEINER: Objection to the form.

10:44:47 7 A. Again, that Madoff was doing all the
10:44:49 8 trades during the month for him.

10:44:51 9 Q. Under whose direction?

10:44:54 10 MR. STEINER: Objection to form.

10:44:55 11 A. Under the direction from Ezra Merkin
10:44:57 12 as far as when to be in and out of the market. But,
10:45:01 13 again, Madoff doing the trades as far as rolling, I
10:45:04 14 guess, in and out of these trades.

10:45:09 15 Q. Now, I want to take you on the first
10:45:14 16 page of this document where the lower portion says,
10:45:16 17 "I was just told by Madoff that they will not have
10:45:19 18 final November numbers until tomorrow morning."

10:45:22 19 What did you understand that
10:45:24 20 statement to mean?

10:45:24 21 A. They hadn't finished doing the --
10:45:25 22 understand what the net P&L was for the month.

10:45:29 23 Q. And were these statements -- these
10:45:31 24 statements were from Mr. Autera.

10:45:33 25 Is that correct?

10:47:39 1 actually all the firms on Wall Street were in
10:47:43 2 questionable financial status at that point.

10:47:47 3 Q. Why were you concerned about Morgan
10:47:50 4 Stanley specifically with respect to your Ascot
5 investment?

10:47:51 6 A. Because they were the custodian of
10:47:54 7 the funds.

10:47:55 8 Q. And did Mr. Merkin respond to your
10:47:57 9 concerns?

10:47:57 10 A. He did respond to the concerns.

10:47:59 11 Q. What, if anything, did he say?

10:48:01 12 A. He said I shouldn't really have to
10:48:03 13 worry about this because he was in the process of
10:48:05 14 setting up desig -- specifically designated accounts
10:48:09 15 at the federal -- at the Fed where each account will
10:48:13 16 have specific attachment to the person's investment
10:48:17 17 and the cash will be transferred into direct deposit
10:48:22 18 sort of treasury accounts.

10:48:23 19 Q. The Fed is the United States
10:48:25 20 Treasury?

10:48:25 21 A. Correct.

10:48:27 22 Q. And what was the effect of this type
10:48:32 23 of movement of capital by Mr. Merkin, what would
10:48:34 24 that have -- what effect would that have?

10:48:36 25 MR. STEINER: Objection to form.

10:48:37 1 A. It was a tremendous relief. I -- I
10:48:42 2 was just grateful that he was considering the risks
10:48:43 3 that I thought were in the marketplace, he himself
10:48:46 4 was concerned about them.

10:48:49 5 Q. And why would moving capital into the
10:48:51 6 Fed give you an added sense of security?

10:48:54 7 A. They print -- they basically -- you
10:48:56 8 know, they guarantee the viability of the United
10:49:01 9 States currencies, it's about as safe a place as you
10:49:03 10 could find.

10:49:08 11 Q. Was Ezra's decision to move the --
10:49:14 12 his assets -- the assets of his -- of the fund into
10:49:18 13 the treasury, did that include Gabriel Fund or just
10:49:21 14 Ascot?

10:49:22 15 A. I just recall discussing Ascot.

10:49:26 16 Q. And after Mr. Merkin told you that
10:49:28 17 your Ascot investment would be held at the treasury,
10:49:32 18 did this information affect your decision on whether
10:49:34 19 or not to liquidate?

10:49:36 20 MR. STEINER: Objection to form. I
10:49:37 21 think it misstates the witness' testimony.

10:49:39 22 Q. Again, what did Mr. Merkin tell you
10:49:41 23 that he was going to do with the funds of Ascot?

24 A. He said --

10:49:43 25 MR. STEINER: Objection to form.

10:49:44 1

Go ahead.

10:49:45 2

A. He said he was going to move the

10:49:46 3

funds into specifically designated accounts by the

10:49:51 4

federal -- by the -- by the Fed, U.S. Fed, and in a

10:49:56 5

sense what would be like a direct deposit account,

10:49:59 6

which I was aware of because my mother had direct

10:50:01 7

deposit accounts, and that gave me a tremendous

10:50:04 8

amount of comfort related to all -- related to other

10:50:06 9

investments that I had that I was very concerned

10:50:08 10

about that at least these funds were going to be

10:50:11 11

protected.

10:50:11 12

Q. And after Mr. Merkin told you this,

10:50:14 13

did that information affect your decision to

10:50:17 14

liquidate your Ascot investments?

10:50:19 15

A. I didn't liquidate them.

10:50:29 16

Q. I want to -- I want to ask you some

10:50:30 17

questions about your time on the Yeshiva investment

10:50:36 18

committee.

19

A. Um-hum.

10:50:37 20

Q. Do you recall approximately when you

10:50:38 21

joined the Yeshiva investment committee?

10:50:40 22

A. 2000, roughly.

10:50:42 23

Q. Okay. And do you recall

10:50:45 24

approximately what the first meeting that you

10:50:47 25

attended was?

10:50:49 1 A. I don't -- I just don't recall.

10:50:51 2 Q. Okay. Let me show you Trustee's
10:50:54 3 Exhibit 238.

10:51:14 4 (Deposition Trustee Exhibit 238
5 marked for identification.)

10:51:17 6 BY MR. ALLEN:

10:51:17 7 Q. Do you recognize what I've just
10:51:18 8 handed to you?

10:51:20 9 A. Not specifically, but, yes -- we
10:51:22 10 typically had minutes circulated after every
10:51:26 11 meeting.

10:51:27 12 Q. And I want you to take a look at the
10:51:29 13 first page of this document.

14 A. Okay.

10:51:32 15 Q. And does this refresh your
10:51:34 16 recollection as to when the first meeting that you
10:51:36 17 attended on the investment committee of Yeshiva
10:51:40 18 University?

10:51:40 19 A. I -- I feel comfortable in saying I
10:51:43 20 was a member of the committee as of August 30th,
10:51:46 21 2000.

10:51:46 22 Q. Okay.
10:51:49 23 How did you come to join the
10:51:52 24 investment committee?

10:51:52 25 A. Ezra asked me if I would be

10:51:55 1 interested in doing that.

10:51:56 2 Q. And how long did you serve on the
10:51:58 3 committee?

10:51:58 4 A. Till, I believe, January of 2009.

10:52:02 5 Q. Now, on August 30th of 2000, who was
10:52:07 6 serving as chairman of the committee?

10:52:09 7 A. Ezra was.

10:52:10 8 Q. And did that position --

10:52:11 9 A. As far as I recall -- yeah, it says
10:52:15 10 it here, so I'm assuming so.

10:52:16 11 Q. Did that position ever change while
10:52:18 12 you were a member of the investment committee?

10:52:20 13 A. Not that I recall.

10:52:21 14 Q. Are you familiar with an individual
10:52:23 15 by the name of Robert Belfer?

10:52:25 16 A. Yeah, just from the board, correct.

10:52:27 17 Q. Is he -- was he a member of the
10:52:30 18 investment committee in 2000?

10:52:31 19 A. Yes.

10:52:31 20 Q. How about Ludwig Bravmann?

10:52:34 21 A. Yes.

10:52:35 22 Q. Was he also a member of the
10:52:37 23 investment committee?

10:52:37 24 A. Yes.

10:52:38 25 Q. David Gottesman?

11:10:39 1

A. Yes.

11:10:39 2

Q. Who is Launny Steffens?

11:10:41 3

A. He, I believe, was the managing

11:10:44 4

partner of Spring Mountain Capital.

11:10:46 5

Q. What is Spring Mountain Capital?

11:10:48 6

A. Is, I think, a fund-of-funds, hedge

11:10:50 7

fund-of-funds.

11:10:51 8

Q. Greg Ho, are you familiar with that

11:10:53 9

name?

11:10:53 10

A. I think he was Launny's partner.

11:10:55 11

Q. At Spring Mountain Capital?

11:10:58 12

A. Yes.

11:10:59 13

Q. And what would cause -- why would --

11:11:00 14

do you know why Launny Steffens or Greg Ho would be

11:11:03 15

invited to an investment committee meeting?

11:11:04 16

A. They really were -- I guess you would

11:11:08 17

call them consultants to the investment committee.

11:11:11 18

I don't recall their exact relationship, but they

11:11:13 19

helped us vet and look at different investments that

11:11:16 20

we had.

11:11:16 21

Q. And how did they come to be

11:11:18 22

consultants?

11:11:18 23

A. I think Ezra introduced them to us.

11:11:25 24

Q. Let me ask you: At any point while

11:11:50 25

you were a member of the investment committee, did

11:11:52 1 the committee discuss Mr. Bernard Madoff with
11:11:55 2 respect to any of its investments?

11:11:57 3 A. The only discussion I recall from any
11:11:59 4 of the meetings was something once related to him
11:12:02 5 with Yeshiva University, again, from the formal
11:12:05 6 perspective of being on the board. I don't remember
11:12:07 7 the exact discussion.

11:12:11 8 Q. At any point while you were a member
11:12:13 9 of the investment committee, was Ascot Partners ever
11:12:16 10 referred to as Bernie?

11:12:18 11 MR. STEINER: Objection to form.

11:12:19 12 A. I don't have specific recall, no.

11:12:21 13 Q. At any point while you were on the
11:12:23 14 investment committee, was Ascot Fund ever referred
11:12:26 15 to as Madoff & Company?

11:12:28 16 A. No.

11:12:28 17 MR. STEINER: Objection to form.

11:12:29 18 A. Not that I recall.

11:12:33 19 Q. I'm sorry, Ascot -- at any point
11:12:35 20 while you were on the investment committee, was
11:12:37 21 Ascot Partners ever referred to as Bernie?

11:12:39 22 MR. STEINER: Objection to form.

11:12:40 23 A. Not that I recall.

11:12:41 24 Q. At any point while you were on the
11:12:44 25 investment committee, was Ascot Partners referred to

11:12:47 1 as Madoff?

11:12:47 2 MR. STEINER: Objection to form.

11:12:48 3 A. Not that I recall.

11:12:49 4 Q. At any point while you were on the
11:12:50 5 investment committee, was Ascot Partners referred to
11:12:53 6 by any other name?

11:12:54 7 MR. STEINER: Objection to form.

11:12:55 8 A. Not that I recall.

11:13:04 9 Q. When did you learn that Mr. Madoff
11:13:06 10 was arrested?

11:13:09 11 A. On Thursday -- I don't recall the
11:13:11 12 exact date -- December 6th, 8th. You probably know
11:13:14 13 better than I, but ...

11:13:15 14 Q. How did you learn of his arrest?

11:13:18 15 A. I think I got a phone call from a
11:13:20 16 friend of mine.

11:13:25 17 Q. After his arrest, did you receive any
11:13:27 18 news accounts with respect to -- that concerned
11:13:30 19 Ascot or Gabriel?

11:13:32 20 A. I don't recall specific news
11:13:35 21 accounts, but I was aware from the news flow, et
11:13:38 22 cetera, that he apparently had done this incredible
11:13:42 23 Ponzi scheme.

11:13:43 24 Q. Did you send -- did there come a time
11:13:46 25 that you sent Mr. Merkin an email --

11:13:49 1 A. I don't recall --

11:13:51 2 Q. -- regarding your Gabriel investment?

11:13:53 3 A. I don't -- right, I don't recall the
11:13:55 4 specific email, but I know I was concerned.

11:13:59 5 Q. Let me show you Trustee's -- what I'm
11:14:01 6 asking to be marked as Trustee's Exhibit 243.

11:14:18 7 (Deposition Trustee Exhibit 243
11:14:18 8 marked for identification.)

11:14:24 9 A. Um-hum, okay.

11:14:26 10 Q. Do you recognize that?

11:14:27 11 A. Yeah, I'm assuming this is from me,
11:14:30 12 yes.

11:14:30 13 Q. What do you recognize it to be?

11:14:32 14 A. An email from me to Mike Autera and
11:14:36 15 Ezra Merkin.

11:14:39 16 Q. And when was that email sent?

11:14:40 17 A. December 12, the day after -- so
11:14:42 18 December 11, I'm gathering, was the date of the
11:14:45 19 arrest -- I'm not sure again. I'm -- the day of
11:14:51 20 Bernie Madoff's arrest was -- I don't recall.

11:14:54 21 Q. But when you -- but you recall -- if
11:14:58 22 I heard you correctly, you recall sending this email
11:15:00 23 the day after?

11:15:01 24 A. I'm assuming I sent this email. It's
11:15:02 25 from me.

1 Q. Okay.

11:15:03 2 A. I don't specifically remember typing
11:15:04 3 it and sending it off.

11:15:07 4 Q. Do you have any reason to doubt this
11:15:09 5 is not your email?

11:15:10 6 A. No, I have no reason to doubt this is
11:15:12 7 not true.

11:15:12 8 Q. I want to direct your attention to
11:15:15 9 the subject line of this email. It reads, "Gabriel
11:15:17 10 Capital - is ALSO affected by Madoff?"

11:15:22 11 A. Right.

11:15:23 12 Q. What did you understand that phrase
11:15:25 13 to mean?

11:15:26 14 A. That apparently I had found out
11:15:29 15 sometime after the announcement till now that
11:15:31 16 Gabriel had a certain percent of their assets that
11:15:34 17 were being managed or, I guess, had actually been
11:15:38 18 physically at Madoff Securities and that was also
11:15:41 19 gone.

11:15:43 20 Q. Was that news consistent with your
11:15:45 21 understanding of the custodian of Gabriel Capital?

11:15:52 22 MR. STEINER: Objection to form.

11:15:53 23 A. No.

11:15:54 24 Q. What was your understanding of
11:15:56 25 Madoff's role in Gabriel when you sent this email?

11:15:59 1 A. I never knew there was any role at
11:16:03 2 all.

11:16:03 3 Q. Did Mr. Merkin respond to this email?

11:16:06 4 A. I don't have any response on here, so
11:16:09 5 I -- I don't know.

11:16:12 6 Q. Did you ever have an opportunity to
11:16:14 7 speak to Mr. Merkin by telephone at any time
11:16:17 8 following Mr. Madoff's arrest?

11:16:19 9 A. I believe we spoke twice on the day
11:16:23 10 of the arrest, late that afternoon -- I don't
11:16:26 11 remember the exact time period of that -- and then I
11:16:29 12 spoke to him, I believe, on the Tuesday, I think it
11:16:32 13 was, five days later, roughly.

11:16:35 14 Q. I want to ask you specifically about
11:16:37 15 the phone call on the date of Mr. Madoff's arrest.

16 A. Um-hum.

11:16:42 17 Q. What, if anything, did you say to
11:16:44 18 Mr. Merkin during that phone call?

11:16:46 19 A. I don't remember all the specifics.
11:16:48 20 What I do recall clearly was that I didn't
11:16:53 21 understand like what happened to the money and --

11:16:58 22 Q. What -- do you recall what you said
11:17:00 23 to him?

11:17:00 24 A. I don't recall the specific
11:17:02 25 conversation, but I recall saying to him, like, you

11:17:07 1 know, I don't -- I couldn't -- I couldn't process
11:17:10 2 the fact that the money wasn't there, especially --
11:17:15 3 I do recall specifically saying to him that I
11:17:18 4 thought all the money had been in designated
11:17:22 5 accounts by the treasury, so how could the money be
11:17:25 6 lost?

11:17:26 7 Q. And when you're talking about the
11:17:27 8 money, are you --

11:17:28 9 A. The investment in Ascot Partners.

11:17:34 10 Q. And how, if at all, did Mr. Madoff --
11:17:36 11 did Mr. Merkin respond to your concerns?

11:17:39 12 A. His response was that he had decided
11:17:42 13 to get back invested in the market.

11:17:43 14 Q. Who did?

11:17:44 15 A. That Mr. Merkin had and had given the
11:17:47 16 funds back to Madoff, which was clear at this point
11:17:52 17 that the funds were being held by Madoff and not by
11:17:56 18 the treasury, Morgan Stanley or anyone else.

11:17:59 19 Q. What, if anything else, did you
11:18:01 20 discuss during that phone call on the date of
11:18:04 21 Mr. Madoff's arrest?

11:18:06 22 A. I don't recall specifically.

11:18:07 23 Q. Now I want to direct your attention
11:18:09 24 to the second phone call that you had with
11:18:12 25 Mr. Merkin --

1 A. Right.

11:18:13 2 Q. -- approximately five days later.

11:18:15 3 A. I don't recall whether the
11:18:17 4 conversation I said right now was the first and/or
11:18:19 5 second conversation. I'm not clear in my own mind.

11:18:33 6 Q. During either of these two phone
11:18:36 7 calls, did you bring up -- did you discuss with
11:18:44 8 Mr. Merkin your understanding that the custodian of
11:18:48 9 Ascot Partners was Morgan Stanley?

11:18:50 10 A. No, I brought up the fact that I
11:18:51 11 thought the money was at the treasury.

11:18:53 12 Q. And what did he say to that?

11:18:55 13 A. He said he had moved it back to be
11:18:57 14 invested in the market. He moved it back to Madoff,
11:19:00 15 I believe was his quote.

11:19:01 16 Q. And what was your understanding of
11:19:03 17 who the custodian of the assets were?

11:19:05 18 A. Well, my --

19 MR. STEINER: Objection to form.

11:19:07 20 A. -- my understanding at that point was
11:19:09 21 it was at the treasury, but that -- that the
11:19:11 22 custodian before then had been Morgan Stanley.

11:19:14 23 Q. Following these two phone calls with
11:19:15 24 Mr. Merkin, what was your understanding of who, in
11:19:18 25 fact, was the custodian of -- of your assets?

11:19:21 1

A. Was --

11:19:23 2

MR. STEINER: Objection to form.

11:19:23 3

A. -- apparently Bernie Madoff. I could

11:19:26 4

figure it out because I had no more money left.

11:19:29 5

Q. Now, was this the first time that --

11:19:33 6

did Mr. Merkin explain to you that the funds were in

11:19:37 7

Mr. Madoff's custody?

11:19:39 8

A. On that phone call?

11:19:40 9

Q. Yeah, during those two phone calls.

11:19:43 10

A. I just remember him saying he moved

11:19:45 11

it back to Madoff.

11:19:45 12

Q. And what did you understand that to

11:19:47 13

mean?

11:19:47 14

A. At this point?

11:19:48 15

Q. Yeah.

11:19:48 16

A. Oh, I clearly understood now that

11:19:50 17

Madoff had the funds.

11:19:56 18

MR. ALLEN: We're just going to take

11:19:58 19

a five-minute break, if that's okay.

11:20:01 20

THE VIDEOGRAPHER: Off the record,

11:20:06 21

11:24.

11:20:08 22

(Recess taken.)

11:31:06 23

THE VIDEOGRAPHER: Back on, 11:35.

11:31:57 24

MR. ALLEN: And, Mr. Steiner, I just

11:31:58 25

want to memorialize what we just discussed. You had

11:50:54 1 MR. ALLEN: Objection to form.

11:50:55 2 A. Right, that would be correct.

11:50:58 3 MR. STEINER: Can we just take a

11:50:59 4 quick break? I think I'm done, but let me consult.

11:51:04 5 THE VIDEOGRAPHER: Off the record,

11:51:05 6 11:51.

11:51:08 7 (Recess taken.)

11:57:05 8 THE VIDEOGRAPHER: Back on, 12:01.

11:57:10 9 MR. STEINER: Thank you, Mr. Smith, I

11:57:12 10 have no further questions at this time.

11:57:14 11 EXAMINATION BY MR. ALLEN:

11:57:15 12 Q. One final question.

11:57:16 13 As you sit here today, do you know

11:57:18 14 whether or not your Ascot Partners investment was

11:57:20 15 ever placed into a directed account at the Fed --

16 (Multiple speakers.)

17 (Clarification for the Reporter.)

11:57:28 18 Q. -- at the U.S. treasury?

11:57:30 19 MR. STEINER: Objection to form.

11:57:32 20 A. I have no -- I have no idea.

11:57:33 21 MR. ALLEN: Thank you very much. I

11:57:35 22 have nothing further.

11:57:36 23 THE VIDEOGRAPHER: Off the record,

11:57:37 24 12:01.

11:57:39 25 (Deposition concluded.)